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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ORSON THOMAS WELLS II,

Defendant and Appellant.

F076486

(Super. Ct. Nos. MCR053064,  
MCR054188)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Elizabeth J. Smutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Tracy Yao, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Detjen, Acting P.J., Smith, J. and DeSantos, J.

A jury convicted appellant Orson Thomas Wells II, in case No. MCR053064, of possession of a concealed dirk or dagger (Pen. Code, § 21310).<sup>1</sup> In a separate proceeding, the court found true four prior prison term enhancements (§ 667.5, subd. (b)). In case No. MCR054188, a jury convicted Wells of assault (§ 240), a misdemeanor.

On October 20, 2017, the court sentenced Wells to an aggregate seven-year local term, the aggravated term of three years on his possession of a dirk or dagger conviction and four one-year prior prison term enhancements. It sentenced him to time served on his assault conviction.

On appeal, Wells contends: (1) the court prejudicially erred in responding to a question by the jury; and (2) the evidence is insufficient to sustain the court's true finding with respect to one of the prior prison term enhancements. We find merit to Wells's second contention, vacate the sentence, and remand the matter for further proceedings. In all other respects, we affirm.

### **FACTS**<sup>2</sup>

At trial, Madera Police Officer John Rosel testified that on August 22, 2015, at approximately 12:45 a.m., while on patrol, he saw Wells walking between some apartments. Wells looked in Rosel's direction and then walked behind a blue Chevy Blazer, as if attempting to conceal himself. As Rosel drove closer, Wells came out from behind the Blazer and began walking towards Rosel's patrol car.

Rosel contacted Wells and noticed he was wearing green latex gloves, a black T-shirt turned inside out that was not tucked in, a black hat and sunglasses. Rosel asked Wells if he had any weapons and Wells replied that he had a knife. Rosel searched Wells and located a kitchen knife tucked into the right side of his waistband with the handle

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The facts underlying Wells's assault conviction in case No. MCR054188 are omitted because Wells does not raise any issues relating to that case.

above the waistband and the blade below it. Wells's T-shirt covered his waistband and the knife.<sup>3</sup> Rosel took the knife from Wells and arrested him.

The prosecution rested after Rosel testified. The defense then rested without presenting any evidence.

During deliberations, the jury sent the court a note asking the following questions: (1) "Once a person discloses a weapon on his person[,] is it considered substantially concealed?" and (2) "What is the definition of substantially concealed?"

In response to the first question, the parties agreed that the court could reply that what a person says has no bearing on whether the weapon is substantially concealed. However, defense counsel objected to the court's second proposed instruction, which is quoted below. When the jury was brought back into the courtroom, the court instructed the jury as follows:

"With respect to your second question, 'What is the definition of substantially concealed?' I can't tell you much. 'Substantially' means what it means in every day [*sic*] life. Ordinary meaning. However, I can say that the mere fact that some portion of the dirk or dagger may have been visible, such as a portion of the handle, makes it no less concealed. A defendant need not be totally successful in concealing a dirk or dagger to be guilty. That's all I can give you."<sup>4</sup>

A short time after resuming deliberations, the jury found Wells guilty of possessing a concealed dirk or dagger.

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<sup>3</sup> A photo of Wells that was introduced into evidence showed that the T-shirt he wore covered an area well below his waistline.

<sup>4</sup> The court's comments were based on language from *People v. Fuentes* (1976) 64 Cal.App.3d 953 (*Fuentes*).

## DISCUSSION

### ***The Alleged Instructional Error***

In *Fuentes*, *supra*, 64 Cal.App.3d at p. 955, a police officer saw the defendant strike a man from behind with a “ ‘long, pointed object with a duct-taped handle.’ ” After the victim fell to the ground, the defendant removed a wrist watch and a wallet from him and a second defendant rummaged through the victim’s pockets. The officer chased and apprehended the defendants a short distance from the crime scene. During a search of defendant Fuentes, the officer found a duct-taped dirk and another copper cylindrical-shaped, pointed object in his waistband. (*Ibid.*) The defendant was subsequently convicted of “grand theft person” (§ 487, subd. (2)) and possession of a dirk or dagger. (*Fuentes*, *supra*, at p. 955.)

On appeal, the defendant contended there was no evidence to show that the dirk was concealed and argued that there was “ ‘not even a suggestion in the record that the dirk was ever anywhere but in plain sight.’ ” (*Fuentes*, *supra*, 64 Cal.App.3d at p. 955.) The *Fuentes* court responded to this argument stating: “The dirk obviously was not in plain sight. This is not a situation where the weapon was carried openly in a sheath or attached to a belt. The dirk was in Fuentes’ waistband. The mere fact that some portion of the handle may have been visible makes it no less a concealed weapon. A defendant need not be totally successful in concealing a dirk to be guilty of violation of [section 21310].” (*Ibid.*)

Wells contends the defendant in *Fuentes* had an immediate need to conceal the dagger he possessed because he had been seen using it to strike the victim. According to Wells, the *Fuentes* court’s statement that a defendant need not be “totally successful” in concealing a dirk implies that the defendant must intend or want to conceal the dirk or dagger to violate section 21310 and that intent to conceal is an element of a violation of section 21310. Thus, according to Wells, the court prejudicially erred in instructing the

jury in the language from *Fuentes* because it lowered the prosecution's burden of proof by directing them to find substantial concealment and allowing the jury to convict him of violating section 21310 without finding an element of this offense, i.e., that he had the specific intent to conceal the dirk or dagger. Wells is wrong.

“ ‘An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury.’ [Citation.] However, ‘[w]e review de novo the legal accuracy of any supplemental instructions provided.’ [Citations.]

“ ‘The court has a primary duty to help the jury understand the legal principles it is asked to apply.’ [Citation.] During jury deliberations ‘when the jury “desire[s] to be informed on any point of law arising in the case ... the information required must be given.” ’ [Citations.] ‘However, “[w]here the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information.” ’ [Citation.] Although the trial court need not always elaborate on the standard instructions, the trial court nevertheless has ‘a “ ‘mandatory’ duty to clear up any instructional confusion expressed by the jury.” ’ ” (*People v. Fleming* (2018) 27 Cal.App.5th 754, 765–766.)

“Intent to conceal can be defined as the defendant’s specific, subjective intent to prevent someone from seeing the knife, or as the defendant’s general intent to purposefully commit the act of placing the knife in a concealed location.” (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1380.)

“In [*People v. Rubalcava* (2000) 23 Cal.4th 322 (*Rubalcava*)] the court held the concealed dirk or dagger offense was a general intent crime, and the statute did not require that the defendant intend to use the concealed instrument as a stabbing instrument. [Citation.] However, *Rubalcava* construed the offense as requiring a knowledge element, stating the defendant must ‘knowingly and intentionally carry

concealed upon his or her person an instrument “that is capable of ready use as a stabbing weapon.” ’ [Citation.] The *Rubalcava* court cited two instances, supported by examples, when the requisite knowledge element would be absent: (1) a defendant who does not know that he is carrying the weapon (for example, if someone slipped a knife into a defendant’s pocket without the defendant’s knowledge)[;] or (2) a defendant who does not know that the concealed instrument may be used as a stabbing weapon (for example, if someone gave a defendant a fixed-blade knife wrapped in a paper towel, but told the defendant the knife had a folding blade that could not lock). [Citation.]

“There is nothing in *Rubalcava* that suggests the knowledge element incorporates a specific intent to conceal the weapon from other persons. However, a requirement that the defendant intentionally commit the act of concealment is encompassed within the principle of general intent. ... [G]eneral intent means that the ‘person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she *intentionally* does a prohibited act ....’ (See CALCRIM No. 250.) [Thus, when] the prohibited act is the concealed carrying of a dirk or dagger ... the defendant must intentionally commit the act of concealment.” (*People v. Mitchell, supra*, 209 Cal.App.4th at pp. 1380–1381.) In accord with *Rubalcava* and *Mitchell*, we reject Wells’s contention that the specific intent to conceal is an element of possession of a concealed dirk or dagger.

Moreover, the trial court here instructed the jury in the language of CALCRIM No. 2501 that to prove the offense of carrying a dirk or dagger, the prosecution had to prove that Wells carried on his person a dirk or dagger, he knew he was carrying it, the dirk or dagger was substantially concealed, and that Wells knew it could be used as a stabbing instrument. The court also instructed the jury that to find

Wells guilty of the charged offense, they had to find that he intentionally committed “the prohibited act.”<sup>5</sup> Thus, the jury was properly instructed on the requisite intent.

Additionally, the court’s response to the jury’s question, that the mere fact that a portion of the dirk or dagger may have been visible, did not make it any less concealed, and that the defendant need not be totally successful in concealing the dirk or dagger to commit the charged offense, was a correct statement of the law. (*Fuentes, supra*, 64 Cal.App.3d at p. 955 [knife in defendant’s waistband with portion of handle visible was substantially concealed]; *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [knife in pocket with only 1.5 inches of tip of blade exposed was substantially concealed].)

Further, the court’s response to the jury’s question did not direct the jury to find substantial concealment. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, absent some evidence that rebuts this presumption, it cannot be inferred that the court’s correct explanation of the law regarding substantial concealment somehow resulted in the jury convicting without finding that he had the requisite general intent. Accordingly, we reject Wells’s claim of instructional error.

In any case, Wells was not prejudiced by any error in the court’s response to the jury. In support of his claim of prejudice, Wells contends that his defense was that he did

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<sup>5</sup> The court instructed the jury on specific intent in the language of CALCRIM No. 251 as follows: “The crime charged in this case requires the proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crime in this case, the person must not only intentionally commit the prohibited act, but must do so with a specific mental state. The act and the specific mental state that are required ... are explained in the instruction for that crime.” The court erred in charging the jury with this instruction because, as noted earlier, carrying a concealed dirk or dagger is not a specific intent crime. Nevertheless, the instruction correctly instructed the jury that the act of concealment had to be intentional.

not intentionally conceal the knife because its concealment “was the accidental result of his clothing choice.” However, during closing argument defense counsel argued only that Officer Rosel’s testimony that the knife was concealed under his T-shirt did not establish beyond a reasonable doubt that his knife was concealed because: (1) Rosel did not have a good opportunity to see Wells because the lighting was poor; and (2) Rosel did not write in his report, or testify at an earlier hearing, that Wells’s T-shirt covered the knife.<sup>6</sup> Further, the defense did not present any evidence to dispute Rosel’s testimony that the knife found on Wells was in his waistband with the blade hidden in the waistband and that his waistband and the remainder of the knife were completely covered by Wells’s T-shirt. Therefore, since Wells did not contend in the trial court that he accidentally concealed the knife and the uncontroverted evidence established that it was completely concealed, alternatively, we conclude that any error in the court’s response to the jury was harmless beyond a reasonable doubt.

### ***The Prior Prison Term Enhancement***

The parties agree the record contains insufficient evidence to support the prior prison term enhancement based on his alleged conviction for violating section 496b, subdivision (a). Wells, however, contends the enhancement must be stricken, whereas respondent contends the matter should be remanded to allow the prosecutor the option of retrying the enhancement. We agree the evidence is insufficient to support the enhancement at issue and we will remand the matter to the trial court to allow the prosecutor to retry the enhancement.

The information alleged four prior prison term enhancements, including one (enhancement No. 4) which allegedly was based on a 2013 conviction in case

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<sup>6</sup> During cross-examination, Rosel testified that he did not write in his report or testify at a prior hearing that Wells’s T-shirt covered the knife. However, during redirect examination, he testified that he wrote in his report and testified at the prior hearing that the knife was concealed.



No. MCR45062 for purchasing items with a library mark (§ 496b, subd. (a)). During the court trial of the enhancements, the prosecutor did not provide any documents that showed that in 2013 Wells was convicted of violating section 496b, subdivision (a). Instead, the documents introduced to prove enhancement No. 4 showed that in 2003, in case No. MCR015866, Wells was convicted of possession for sale of methamphetamine.

The prosecutor had the burden of proving the prior prison term enhancements true beyond a reasonable doubt. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232.) Since the prosecutor did not provide any evidence to prove the allegations that Wells was convicted of possession of items with a library mark in 2013 or that he served a prison term for such a conviction, the evidence is insufficient to sustain the court's true finding with respect to enhancement No. 4. Further, we will remand the matter to the trial court so that the prosecution may have the option of retrying that enhancement. (*People v. Monge* (1997) 16 Cal.4th 826, 845.)

### **DISPOSITION**

The judgment of conviction and the state prison sentence is affirmed. The true findings on the allegations of a prior separate term in case No. MCR45062 is reversed. Upon the issuance of remittitur, the prosecutor shall have 60 days to elect to retry the prior, separate prison term enhancement (enhancement No. 4) that was purportedly based on his conviction for possession of items with a library mark (Pen. Code, § 496b, subd. (a)). If the prosecutor does not elect to retry the enhancements, or if retried and not proved, the unsustained allegations shall be found not true and the defendant shall be sentenced to an aggregate local term of only six years, the aggravated term of three years on the substantive offense and three one-year prior prison term enhancements. Upon resentencing, an amended abstract of judgment shall be prepared and delivered to the appropriate authorities.